Supreme Court, U.S.
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In The

Supreme Court of the United States

J. WAYNE GARNER, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, JAMES T. MORRIS, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, GARFIELD HAMMONDS, JR., former Chairman of the State Board of Pardons and Paroles of the State of Georgia, BOBBY K. WHITWORTH, Member of the State Board of Pardons and Paroles of the State of Georgia, and TIMOTHY E. JONES, former Member of the State Board of Pardons and Paroles of the State of Georgia,

Petitioners,

v.

ROBERT L. JONES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Georgia, through its State Board of Pardons and Paroles, makes provision for the exercise of executive clemency in the case of individuals convicted of violations of Georgia's criminal statutes. Both the Supreme Court of Georgia and the United States Court of Appeals for the Eleventh Circuit have surveyed the relevant Georgia statutory and constitutional provisions and have concluded that the Board, in the exercise of the clemency power, exercises "virtually unfettered discretion."

Except as otherwise provided by law, inmates serving sentences of life imprisonment become eligible for the exercise of the Board's powers after the service of seven years' imprisonment. The Board is authorized to provide, by regulation, for eligibility for reconsideration of those inmates considered for, but denied, parole.

The questions presented are:

1.

Whether the ex post facto clause of the United States Constitution bars the State from applying its amended regulation governing the reconsideration schedule for life-sentenced inmates who have been denied parole, when the amendment has no effect on the sentence imposed, the substantive formula for the consideration of the prisoner for parole, or the determination of the prisoner's eligibility for parole, or whether the change creates only "the most speculative and attentuated possibility of producing the prohibited effect of increasing the measure of punishment."

QUESTIONS PRESENTED – Continued

2.

Whether the decision below conflicts with the decisions of other United States Courts of Appeals and the appellate courts of the several states as to the meaning and import of this Court's decisions in *California Dep't of Corrections v. Morales* and *Lynce v. Mathis*.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the Court of Appeals and in the District Court were as listed in the caption. For the purposes of Respondent's claims for declaratory and injunctive relief, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Petitioners are Walter S. Ray, Chairman, Bobby K. Whitworth, Garfield Hammonds, Jr., Dr. Betty Ann Cook, and Dr. Eugene P. Walker, the current members of the Board.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on January 6, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Jones v. Garner*, 164 F.3d 589 (11th Cir. 1999), and is printed as Appendix A, *infra*, 1a. The order on the merits by the United States District Court for the Northern District of Georgia, No. 1:95-cv-3012-CAM (August 25, 1997), is printed as Appendix B, *infra*, 20a.

JURISDICTION

The court of appeals entered its opinion and judgment on January 6, 1999 (App. A, *infra*, 1a) and entered its denial of Petitioners' Motion For Rehearing and Suggestion of Rehearing En Banc on April 19, 1999 (App. C, *infra*, 30a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 10:

> No State shall . . . pass any . . . ex post facto Law . . . .

STATEMENT

A. Claims and Facts

The State of Georgia, through its State Board of Pardons and Paroles, makes provision for the exercise of executive clemency in the case of individuals convicted of violations of Georgia's criminal statutes. Both the Supreme Court of Georgia and the United States Court of Appeals for the Eleventh Circuit have surveyed the relevant Georgia statutory and constitutional provisions and have concluded that the Board, in the exercise of the clemency power, exercises "virtually unfettered discretion." *Jones v. Georgia State Board of Pardons and Paroles*, 59 F.3d 1145, 1150 (11th Cir. 1995); *see also Vargas v. Morris*, 266 Ga. 141, 465 S.E.2d 275, *cert. denied sub nom Vargas v. Garner*, ___ U.S. ___, 116 S.Ct. 1329, 134 L.Ed.2d 480 (1996).

Except as otherwise provided by law, inmates serving sentences of life imprisonment become eligible for the exercise of the Board's powers after the service of seven years' imprisonment. O.C.G.A. § 42-9-45(b). The Board is authorized to provide, by regulation, for eligibility for reconsideration of those inmates considered for, but denied, parole. O.C.G.A. § 42-9-45(a).

Prior to 1979, the Board's regulations provided that life sentenced inmates considered for, but denied, parole

would be reconsidered on an annual basis. In 1979, due to increases in the prison population, the Board amended its regulation so as to provide for reconsideration of these inmates no less than every three years (while retaining the discretion to consider the inmate sooner). This amendment was applied by the Board to all life-sentenced inmates, including those whose crimes had been committed prior to 1979.

In 1985, as Georgia's prison population continued to increase, and in an attempt to provide life sentenced inmates with a more realistic assessment of their chances for release on parole, the Board again amended its policy to provide for parole reconsideration no less than every eight years. Again, the Board retained the discretion to consider the prisoner more frequently. This amendment was likewise applied to all life-sentenced inmates, including those whose crimes had been committed prior to 1979. Ga. Admin. Comp. Ch. 475-03-.05(2).

Prisoners convicted of crimes committed prior to 1985 challenged the retroactive application of the amended regulation. The United States Court of Appeals for the Eleventh Circuit found that the retroactive application of the amended regulation violated the ex post facto clause. *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991).

In 1995, this Court decided the case of *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). In *Morales*, this Court ruled that a retroactive application of a revision to the schedule for the reconsideration of prisoners previously denied parole was not an ex post facto violation, so long as the change created no real, practical effect

upon the prisoner's chances for parole. Based upon advice from the Attorney General of Georgia that the Court's decision in *Morales* was inconsistent with the Eleventh Circuit's holding in *Akins*, the Board resumed retroactive application of its amended regulation.

On July 23, 1974, Respondent had been sentenced to life imprisonment following his conviction for the murder of Jack Bell in the Superior Court of Fulton County, Georgia. On November 24, 1979, Respondent escaped from custody. While on escape, Respondent murdered Frances Tutt Davis. Respondent was convicted of her murder, and again sentenced to life imprisonment, in the Superior Court of Fulton County on August 20, 1982.

Respondent was initially considered for, and denied, parole in September, 1989. He was reconsidered, and again denied, in September, 1992. Respondent was considered a third time, and again denied parole, in September, 1995. At that time, Respondent was advised that his next reconsideration would come within the next eight years.

B. Proceedings Below

Respondent brought suit, contending that retroactive application of the amendment violated the ex post facto clause of the United States Constitution. Respondent sought damages, as well as a declaratory judgment that the application of the amended regulation in his case violated the ex post facto clause.

Following a period of discovery, the parties filed cross-motions for summary judgment. The District Court

granted summary judgment to the Board, finding that, as in *Morales*, the amended regulation "creates 'only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment.' "

On appeal, a panel of the Eleventh Circuit reversed and remanded. The Court held that *Morales* reinforced its earlier holding in *Akins*, that the record did not support a finding that the amendment did not have the purpose or effect of increasing the quantum of punishment, and accordingly reversed the grant of summary judgment to the Board. The Court subsequently denied the Board's Motion for Rehearing with Suggestion for Rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT PLACED THE BURDEN OF PROOF UPON PETITIONERS, CONTRARY TO THE HOLDINGS OF THIS COURT, THE FOURTH CIRCUIT, AND THE NINTH CIRCUIT.

The Eleventh Circuit placed upon Petitioners the burden of showing that the application of Ga. Admin. Comp. Ch. 475-3-.05(2) would not pose a risk of increasing Plaintiff's sentence. *Jones*, 164 F.3d at 596. This was plain error. In any ex post facto inquiry, the burden is on the prisoner to demonstrate that the law in question will, as applied to his case, violate the ex post facto clause. *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 897-98 (1997) explaining *California Dep't of Corrections v. Morales*, 514 U.S. ___, 115 S.Ct. 1597 (1995). *See also Roller v. Gunn*, 107 F.3d 227, 237 (4th

Cir.), *cert. denied*, 522 U.S. 874 (1997), quoting *Johnson v. Gomez*, 92 F.3d 964, 968 (9th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997) (after *Morales*, the prisoner bears the burden of demonstrating " . . . 'with assurance' . . . that he would have received parole under the old system"). The Eleventh Circuit erred in shifting this burden to the Board. The transfer of the burden of proof was plain error and conflicts squarely with this Court's own explanation of its holding in *Morales*. This decision also conflicts with the decisions of the Fourth and Ninth Circuits, which have squarely placed the burden of proof on the prisoner.

II. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE RECENT DECISIONS OF THIS COURT AND THE CONSTRUCTION OF THOSE DECISIONS BY THE OTHER CIRCUITS AND THE APPELLATE COURTS OF THE SEVERAL STATES.

This Court has recently illustrated the proper approach to applying the ex post facto clause in *California Dep't of Corrections v. Morales*, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995), and *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1996). When "[t]he amendment creates only the most speculative and attenuated possibility of increasing the measure of punishment for covered crimes," *Morales*, 514 U.S. at 509, and "the change at issue ha[s] neither the purpose nor the effect of increasing the quantum of punishment," *Lynce*, 117 S.Ct. at 897, then the retroactive application of a new statute, regulation, or procedure does not violate the ex post facto clause.

In the case at bar, it is clear that application of the "set off" regulation to Respondent will not affect his ultimate date of release. Once an inmate becomes eligible for parole, the Board exercises unfettered discretion in determining whether or not to grant parole in an individual case and, if so, when release is to be granted. Stated bluntly, the Board has determined that, based upon the facts known to the Board about his case, Respondent may not reasonably expect to be paroled within the next eight years. It defies reason to suggest, as the Eleventh Circuit has done, and as proper ex post facto jurisprudence would require if that decision be sustained, that mere repetitive viewing of his file during the interim would change that conclusion.

In the short time since *Akins* was decided, it has been widely cited for its application of the ex post facto clause.[1] As Justices White and Blackmun prophetically noted, the Circuits were divided on the issue of the proper application of the ex post facto clause to parole reconsideration schedules as early as 1992 and, as they also predicted, the issue arises frequently. *Bailey v. Noot*, 503 U.S. 952, 112 S.Ct. 1516, 117 L.Ed.2d 652 (1992) (White, J., dissenting). Subsequent to *Morales*, the First,[2]

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[1] Shepard's citations showed "21 Citing References" to *Akins, supra*, on July 12, 1999.

[2] *Hamm v. Latessa*, 72 F.3d 947, 957-59 (1st Cir. 1995), *cert. denied*, 519 U.S. 836 (1996).

Fourth,[3] Fifth,[4] and Sixth[5] Circuits have expressly rejected the Eleventh Circuit's application of ex post facto principles to parole reconsideration scheduling, as have state appellate courts in Colorado,[6] Florida,[7] Illinois,[8] and Tennessee.[9] In light of the split in the circuit courts and state appellate courts on this issue, and the current activity in the district courts, the federal courts most certainly will continue to be faced with the question of the proper application of the ex post facto clause to parole reconsideration schedules. This Court should accept certiorari of this important decision now, rather than to delay and allow this confusion, with its disruption of state planning and budgeting, to continue.

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[3] *Roller v. Gunn*, 107 F.3d 227, 234-37 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997); *Hill v. Jackson*, 64 F.3d 163, 167-71 (4th Cir. 1995).

[4] *Allison v. Kyle*, 66 F.3d 71, 74-75 (5th Cir. 1995).

[5] *Shabazz v. Gabry*, 123 F.3d 909, 913-916 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997); *Phelps v. Traugher*, 1996 U.S. App. LEXIS 8009 (6th Cir. Tenn. Mar. 20, 1996).

[6] *Furnari v. Zavaras*, 914 P.2d 508, 509-11 (Colo. App. 1996).

[7] *Tuff v. State*, 1999 Fla. App. LEXIS 6424 (Fla. App. May 19, 1999).

[8] *Fletcher v. Williams*, 179 Ill. 2d 225, 235-36, 688 N.E.2d 635, 641-42 (1997).

[9] *Jordan v. Tennessee Board of Paroles*, 1997 Tenn. App. LEXIS 27 (Tenn. App. January 15, 1997).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-9009

D. C. Docket No. 1:95-cv-3012-CAM

ROBERT L. JONES,

Plaintiff-Appellant,

versus

J. WAYNE GARNER, Employed as Chairman,
State Board of Pardons and Paroles, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(January 6, 1999)

Before BIRCH and BARKETT, Circuit Judges, and HANCOCK*, Senior District Judge.

BARKETT, Circuit Judge:

Robert Jones appeals the district court's order granting summary judgment to defendants J. Wayne Garner and other former and current members of the Georgia Board of Pardons and Paroles ("the Board") on Jones' claim that the retroactive application of amendments to

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* Honorable James H. Hancock, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

the Georgia regulations governing parole consideration, Ga. Comp. R. & Regs. r. 475-3-.05.(2) (1986), violated the Ex Post Facto Clause of Article I, § 10 of the United States Constitution. In *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991), we held that retroactive application of r. 475-3-.05(2) violated this clause's prohibition on ex post facto laws. After the Supreme Court decided *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995), in which it held that the retroactive application of a legislative amendment to the California parole regulations that decreased the frequency of parole suitability hearings in certain circumstances did not represent an ex post facto violation, the Board concluded that *Akins* had been overruled and scheduled Jones' next hearing for 2003 pursuant to the rule promulgated in 1986. The district court agreed that *Morales* overruled *Akins*, and granted summary judgment to the defendants. We find that *Morales* reinforced our holding in *Akins*, and pursuant to *Morales* and *Akins*, we REVERSE.

I. Background

The facts of this case are not in dispute. In July 1974, Jones was sentenced in the Superior Court of Fulton County, Georgia, to life in prison for murder. In August of 1982 he was again sentenced in the same court to life in prison for murder on subsequent charges. At the time of Jones' second offense, the state regulations governing parole consideration required that he first be considered for parole after seven years and, if parole was not granted at that time, that he be considered every three years thereafter. After Jones was incarcerated but before he was initially considered for parole, the Board amended its

rules to require that parole reconsideration take place only once every eight years. *See* Ga. Comp. R. & Regs. r. 475-3-.05.(2).[1]

Jones was initially considered for parole in 1989, seven years after his 1982 conviction, and parole was denied. At that time, rather than scheduling Jones for a rehearing after three years as provided for by the Board rules at the time of the offense, the Board scheduled Jones for reconsideration eight years later, in 1997. In the meantime, however, this Court decided *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991), in which it held that the retroactive application of r. 475-3-.05.(2) violated the Ex Post Facto Clause of Article I, § 10 of the United States Constitution. As a result, Jones was reconsidered for parole in three year intervals, in 1992 and again in 1995. In 1995, however, the Supreme Court decided *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). The Board read *Morales* to overrule *Akins*, and as a consequence, rather than scheduling Jones' next consideration for 1998, the Board scheduled Jones for reconsideration in 2003 (eight years later).

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[1] As amended, the regulation relating to frequency of parole reconsideration reads as follows:

> Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possible discouraging diagnostic opinions.

Ga. Comp. R. & Regs. r. 475-3-.05.(2).

In 1995, following the Board's rescheduling of his next parole reconsideration for 2003, Jones filed a pro se § 1983 action in the Northern District of Georgia, alleging that the Board's action violated several of his constitutional rights. The district court dismissed his complaint as frivolous on all counts. Jones appealed the dismissal, and a panel of this Court reversed in part, finding Jones's allegation of an Ex Post Facto Clause violation not to be frivolous. On remand, both parties filed motions for summary judgment. The district court granted defendant's motion for summary judgment and denied Jones' motion on the ground that *Morales* had overruled *Akins*. Jones now appeals.

II. Discussion

The Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law. . . . " U.S. Const. art. I, § 10, cl. 1. At the time of the drafting of the Constitution, the phrase " 'ex post facto law' was a term of art with a well-established meaning." *Akins v. Snow*, 922 F.2d at 1560. In *Calder v. Bull*, 3 U.S. (Dall.) 386 (1798), the Supreme Court "identified several legislative acts that clearly implicated the core concerns" with respect to ex post facto laws that existed at the time the Constitution was written. *Akins*, 922 F.2d at 1560-61. Included in such legislative acts was any law " . . . that *changes the punishment*, and *inflicts a greater punishment*, than the law annexed to the crime, when committed." *Akins*, 922 F.2d at 1560-61 (quoting *Calder*, 3 U.S. (Dall.) at 390 (emphasis in original)). The Supreme Court's ex post facto rulings have continued to adhere to the original principle that

laws with this effect violate the Constitution's ex post facto prohibition. *See id.* (collecting cases).[2]

Aikins v. Snow

In *Akins*, this Court considered an ex post facto challenge to the retroactive application of the amendments to Georgia's regulations governing parole consideration at issue here, *see* Ga. Comp. R. & Regs. r. 475-3-.05.(2), and held such application to violate the proscription against laws " 'that *change*[ ] *the punishment*, and *inflict*[ ] *a greater punishment* than the law annexed to the crime when committed.' " *Akins*, 922 F.2d at 1560-61 (quoting *Calder*, 3 U.S. (Dall.) at 390 (emphasis in original)). When the crimes for which the petitioners in *Akins* were convicted were committed, "the Board's rules required the Board to initially consider an inmate serving a life term for parole after serving seven years of his life sentence." *Id.* at 1560. If the inmate was denied parole at that time, he would receive reconsideration every year thereafter. *See id.* The regulation was subsequently amended so that "[parole r]econsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years." Ga. Comp. R. & Regs. r. 475-3-.05.(2). Applying the two-pronged test for Ex Post Facto Clause violations established by the Supreme Court in *Weaver v.*

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[2] *Miller v. Florida*, 482 U.S. 423, 429 (1987); *Weaver v. Graham*, 450 U.S. 24, 28 (1981); *Dobbert v. Florida*, 432 U.S. 282, 292 (1977); *Lindsey v. Washington*, 301 U.S. 397, 401 (1937); *Rooney v. North Dakota*, 196 U.S. 319, 324-325 (1905); *In re Medley*, 134 U.S. 160, 171 (1890); *Cummings v. Missouri*, 71 U.S. 277, 325-326 (1867); *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798).

Graham, 450 U.S. 24, 29 (1981),[3] we found both that the Georgia regulation was retroactive and that, by creating significant delays between parole reconsideration hearings, the application of the regulation "substantially disadvantages a prisoner." *Akins*, 922 F.2d at 1564.[4]

California Dep't of Corrections v. Morales and Lynce v. Mathis

Four years later, the Supreme Court entertained an ex post facto challenge to retroactive application of an amended California Department of Corrections regulation governing parole eligibility. *See California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). At the time that Morales committed the crime for which he was incarcerated, the California parole consideration regulations specified that, once an inmate became eligible for an initial parole consideration hearing, if the inmate was

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[3] First, the law must be "retrospective, that is, it must apply to events occurring before its enactment. . . . " *Weaver*, 450 U.S. at 29. Second, the law must "disadvantage the offender affected by it." *Id.* (quoted in *Akins*, 922 F.2d at 1563).

[4] In *Akins*, we addressed three preliminary questions as a predicate to making the ultimate ex post facto determination. Specifically, we found that: (1) Georgia's administrative regulation governing parole reconsideration is a "law" for purposes of the Ex Post Facto Clause, *see Akins*, 922 F.2d at 1561; (2) that a parole reconsideration hearing is part of a prisoner's parole eligibility, *id.* at 1561-62; and (3) that, because parole eligibility is part of an offender's punishment, "for ex post facto purposes, parole eligibility must be considered part of any sentence." *Id.* at 1563. None of these holdings has been called into question either by the Supreme Court's decision in *Morales*, 514 U.S. 499 (1995), or by the parties on appeal.

denied parole at that time, he or she would be eligible for annual reconsideration. *See id.* at 503. Subsequent to Morales' sentencing, however, the California legislature amended the regulation to authorize the Board of Prison Terms "to defer subsequent suitability hearings for up to three years if the prisoner has been convicted of 'more than one offense which involves the taking of a life' and if the Board 'finds that it is not reasonable to expect that parole would be granted at a hearing during the following [two] years and states the bases for the findings.' " *Id.* (quoting Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982)).

In *Morales*, the Supreme Court rejected an expansive reading of the Ex Post Facto Clause as forbidding any and all legislative change having any conceivable risk of affecting a prisoner's punishment. *See id.* at 508. Instead, the Court found it to be "a matter of 'degree' " as to which "legislative adjustments 'will be held to be of sufficient moment to transgress the constitutional prohibition [on ex post facto laws].' " *Id.* at 509 (quoting *Beazell v. Ohio*, 269 U.S. 167, 171 (1925)). Declining to provide a universal formula for identifying legislative changes that violate the ex post facto prohibition, *id.*, the Court directed that each case be analyzed by asking "whether [the law at issue] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes," *id.*, and proceeded to apply this standard to the California statute at issue in *Morales*.

First, the Court noted that the regulation as amended applies "only to a class of prisoners for whom the likelihood of release on parole is quite remote": those prisoners "who have been convicted of 'more than one

offense which involves the taking of a life.' " *Id.* at 510 (quoting Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982)).

Second, the Court found that the California amendment was intended only "as a means 'to relieve the [state's Board of Prison Terms] from the costly and time-consuming responsibility of scheduling parole hearings for prisoners who have no chance of being released,' " *id.* at 511 (quoting *In re Lawrence A. Jackson*, 39 Cal.3d 464, 473 (1985) (quoting legislative history)) – and not to increase the punishment of the affected offenders. The Court found the measure to be "carefully tailored" to the end of saving time and money, *id.*, and to incorporate several safeguards to ensure that its application does not result in extending the sentence of a prisoner who would be eligible for parole in the intervening two years. *See id.* Specifically, the Court noted that "the amendment has no effect on any prisoner unless the Board has first concluded, after a hearing, not only that the prisoner is unsuitable for parole, but also that 'it is not reasonable to expect that parole would be granted at a hearing during the following years.' " *Id.* at 511 (quoting § 3041.5(b)(2)). In this regard, the Court particularly emphasized the statutory requirement that "the [California Board of Prison Terms] must conduct 'a full hearing and review' of all relevant facts, and state the bases for its finding." *Id.* (quoting § 3041.5(b)(2)).[5]

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[5] The Court added that "[t]hough California law is not entirely clear on this point, the reliability of the Board's determination may also be enhanced by the possibility of an administrative appeal." *Morales*, 514 U.S. at 511 (citing Tit. 15 Cal. Code of Regulations, § 2050 (1994)).

Finally, the *Morales* Court noted that, under the amended regulation, the California Board of Prison Terms retains "the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner." *Id.*; *see also id.* ("The default is an annual hearing but the Board may defer the next hearing up to two years more depending on the circumstances.") (citing § 3041.5(b)(2)). In particular, the Court found no reason to fear that a prisoner who would have been found qualified for release one or two years previous would suffer a later actual release date than he would have under the old annual review system. The Court noted that in California, it is often the case that an inmate's actual release date will come several years after a finding of suitability by the Board. *See id.* at 513. It therefore reasoned that, because the Board retained the discretion to expedite the release date of an inmate who is able to demonstrate "that he was 'suitable' for parole two years prior to such a finding by the Board," such an inmate "might well be entitled to secure a release date that reflects that fact." *Id.*

On the basis of the safeguards in place in the amended California regulation, the *Morales* Court concluded that the regulation as amended "creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 514. As the Court put it,

> [i]n light of the particularized findings required under the amendment and the broad discretion given to the Board, the narrow class of prisoners covered by the amendment cannot reasonably expect that their prospects for early release on

> parole would be enhanced by the opportunity of annual hearings. For these prisoners, the amendment simply allows the Board to avoid the futility of going through the motions of reannouncing its denial of parole suitability on a yearly basis.

Id. at 512. The Court therefore found no ex post facto violation. *See id.* at 514.

Subsequently, in *Lynce v. Mathis*, 519 U.S. 433 (1996), the Supreme Court found Florida's attempt to cancel retroactively the accumulated overcrowding credits awarded to inmates convicted of murder and attempted murder to be a violation of the prohibition on ex post facto laws, and in the course of so doing, provided some guidance to courts applying the standards established in *Morales*. The *Lynce* Court emphasized in particular two features of the Court's reasoning in that case. First, it underscored that the "bulk of [the Court's analysis in *Morales*] focused on the effect of the law on the inmate's sentence" and that the holding in *Morales* "rested squarely on the conclusion that 'a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings.' " *Lynce*, 117 S.Ct. at 897 (quoting *Morales*, 514 U.S. at 513); *see also id.* at 898 n.16 ("Simply put, we rejected the inmate's claim in *Morales*, because it could not be said with any certainty that the amended statutory scheme was more 'onerous' than at the time of the crime.").

Second, the *Lynce* Court emphasized the need to assess the legislature's purpose behind the change in the sentencing scheme as well as the possible effect of the change on offenders' sentences. In *Lynce*, the Court

pointed out that *Morales* never addressed the question as to whether a legislative purpose to "increas[e] the quantum of punishment" would alone "be a sufficient basis for concluding that a law violated the Ex Post Facto Clause when it actually had no such effect." *Id.* at 897. However, the Court underscored that in *Morales*, where no ex post facto violation was found, "the change at issue had neither the purpose nor the effect of increasing the quantum of punishment." *Id.* In *Lynce*, on the other hand, the Court saw no evidence that the Florida legislature effected the change at issue in that case "merely to save time or money" in those cases in which the ultimate date of release would remain entirely unaffected. Rather, the Court found "it [to be] quite obvious that the retrospective change was intended to prevent the early release of prisoners convicted of murder-related offenses who had accumulated overcrowding credits." *Lynce*, 117 S.Ct. at 897-98. This finding supported the Court's conclusion that the Florida provision violated the prohibition on ex post facto laws.

The Amended Georgia Regulation

As *Morales* and *Lynce* make clear, our inquiry regarding the retroactive application of Georgia's regulation governing parole reconsideration, r. 475-3-.05.(2), must focus on its effect on " 'a prisoner's ultimate date of release,' " *id.* at 897 (quoting *Morales*, 514 U.S. at 513), in order to determine whether the change constitutes a "sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 897 n.14 (quoting *Morales*, 514 U.S. at 509). To determine whether the retroactive application of the Georgia regulation gives rise to

such a risk, we examine the regulation in light of the factors discussed in *Morales*, and find it to be wholly distinguishable from the statute at issue in that case.

First, unlike the California statute, it cannot be said of Georgia's r. 475-3-.05.(2) that it applies "only to a class of prisoners for whom the likelihood of release on parole is quite remote." *Morales*, 514 U.S. at 510. The California statute at issue in *Morales* applied only to those inmates "who have been convicted of 'more than one offense which involves the taking of a life.' " *Id.* (quoting Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982)). The set of affected inmates is thus likely to be extremely small. The Georgia provision, in contrast, applies to all "those inmates serving life sentences," r. 475-3-.05.(2). In Georgia, it turns out, this group can include prisoners convicted of murder, *see* GA. CODE ANN. § 16-5-1; felony murder, *see id.*; rape, *see* GA. CODE ANN. § 16-6-1; armed robbery, *see* GA. CODE ANN. § 16-8-41; kidnapping for ransom, *see* GA. CODE ANN. § 16-5-40; hijacking an aircraft, *see* GA. CODE ANN. § 16-5-44; more than one count of child molestation, *see* GA. CODE ANN. § 16-6-4; perjury that was the cause of someone else being sentenced to death, *see* GA. CODE ANN. § 16-10-70; more than one count of possession or use of a machine gun, sawed-off rifle, sawed-off shotgun, or a firearm equipped with a silencer during the commission or attempted commission of a series of enumerated offenses,[6] *see* GA. CODE ANN. § 16-11-160; and

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[6] This list includes:

(1) Aggravated assault as defined in Code Section 16-5-21;

(2) Aggravated battery as defined in Code Section 16-5-24;

more than one count of a series of prohibitions on the manufacture, possession, sale, or distribution of certain controlled substances, *see* GA. CODE ANN. § 16-13-30. The set of inmates whose parole consideration will be affected by r. 475-3-.05.(2) is thus bound to be far more sizeable than the set of inmates affected by the California provision at issue in *Morales*. This set must also – unless we are to believe that the state of Georgia imposes a sentence of life in prison without parole for the entire set of offenses just enumerated – be comprised of many inmates who can expect at some point to be paroled. For this reason, we are unable to conclude that r. 475-3-.05.(2) will apply

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(3) Robbery as defined in Code Section 16-8-40;

(4) Armed robbery as defined in Code Section 16-8-41;

(5) Murder or felony murder as defined in Code Section 16-5-1;

(6) Voluntary manslaughter as defined in Code Section 16-5-2;

(7) Involuntary manslaughter as defined in Code Section 16-5-3;

(8) Sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances in violation of any provision of Article 2 of Chapter 13 of [Title 16], the "Georgia Controlled Substances Act";

(9) Terroristic threats or acts as defined in Code Section 16-11-37;

(10) Arson as defined in Code Sections 16-7-60, 16-7-61, and 16-7-62;

(11) Influencing witnesses as defined in Code Section 16-10-93; and

(12) Participation in criminal gang activity as defined in Code Section 16-15-4.

GA. CODE ANN. §16-11-160.

"only to a class of prisoners for whom the likelihood of release on parole is quite remote."

Second, unlike the California statute, the Georgia regulation cannot be said to be "carefully tailored" so as to support a finding that the measure was intended only to further the legitimate end of saving time and money and not to "increas[e] the quantum of punishment." *Lynce*, 117 S.Ct. at 897. The *Morales* Court emphasized that safeguards built into the California provision would ensure that retroactive application would not extend the sentences of those prisoners who would be otherwise eligible for parole in the years between hearings. In particular, the Court noted the statutory requirement that "the [California Board of Prison Terms] must conduct 'a full hearing and review' of all relevant facts, and state the bases for its finding" that " 'it is not reasonable to expect that parole would be granted at a hearing during the following [two] years.' " *Morales*, 514 U.S. at 511 (quoting Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982)).

The same cannot be said for the Georgia regulation. It reads, in its entirety,

> Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possible discouraging diagnostic opinions.

Ga. Comp. R. & Regs. r. 475-3-.05.(2). The Board is not required to make any particularized findings supporting its conclusion that, as to the inmate under consideration, "it is not reasonable to expect that parole would be

granted" during the intervening eight years before the next hearing – indeed, as the facts of this case indicate, the Board would be within its discretion to say next to nothing.[7] Nor is the Board required to have any sort of hearing on this question, much less the "full hearing" required by the California statute approved by the Supreme Court in *Morales*.

Unlike the California provision at issue in *Morales*, which established an annual hearing as a default but conferred on the Board of Prison Terms the authority to "defer the next hearing up to two years more depending on the circumstances," the Georgia regulation simply sets the default for affected inmates at reconsideration "at least every eight years." Eight years is a long time. Much can happen in the course of eight years to affect the determination that an inmate would be suitable for parole. The *Morales* Court emphasized that, because an

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[7] The letter Jones received from the Board in 1995 illustrates the minimal burden the regulation places on the Board to justify its scheduling decisions. In its entirety, this letter reads:

> Dear Mr. Jones,
>
> You have been thoroughly and carefully considered for parole. The Board's decision is to deny parole at this time. The main reasons for the decision cited by the Board members during their individual study of your case are circumstances and nature of the offense, and multiple offenses.
>
> The Board has decided to consider you again for parole during August 2003.
>
> Sincerely,
> [signature].

R.1-18-Ex.3

inmate's "parole release date [often] comes at least several years after a finding of suitability," and because the Board "retains the discretion to expedite the release date of such a prisoner," a prisoner affected by the amended California statute who can demonstrate "that he was 'suitable' for parole two years prior to such a finding by the Board might well be entitled to secure a[n earlier] release date that reflects that fact." *Morales*, 514 U.S. at 513. The eight-year period specified in r. 475-3-.05.(2), however, is simply too long to allow us to say that an inmate who would have been able to demonstrate suitability for parole in the years between reconsideration hearings would be able to "cure" this delay through petitioning for an earlier release date. There is therefore a "sufficient risk" that the amended Georgia regulation would "increas[e] the measure of punishment attached to the covered crimes." *Id.* at 509.

We are not persuaded by the Board's argument that the policy statement it issued in October 1996 cures the constitutional defects of r. 475-3-.05.(2) identified here. *See* State Board of Pardons and Paroles Policy Statement No. 4.110. The relevant language of the policy statement provides that

> *Policy*: It is the policy of the Board that all Life Sentence Cases denied parole may be set for reconsideration up to a maximum of eight years from the date of the last denial when, in the Board's determination, it is not reasonable to expect that parole would be granted during the intervening years. Inmates set-off under this policy may receive expedited parole reviews in the event of a change in their circumstance or

> where the Board receives new information that would warrant a sooner review.
>
> *Procedures*: At the time the Members vote to deny parole in a Life Sentence Case, the Members will indicate the number of years the inmate must serve prior to being next considered.

See id. §§ 1.105-06.

This policy does not sufficiently mitigate the defects in the regulation itself to defeat an ex post facto challenge. Policy statements, unlike regulations, are unenforceable and easily changed, and adherence to them is a matter of the Board's discretion. These are qualities that caution against treating their contents as if they had the authority of officially promulgated statutes or regulations. Moreover, even notwithstanding these limitations, this particular policy statement still does not require the Board to make particularized findings or even to provide clear reasons for its decision regarding the scheduling of subsequent hearings. And it also, of course, continues to allow an interval of eight years between hearings without any requirement that the Board consider an inmate's case during that time. Given the large class of affected inmates, this eight-year interval seems certain to ensure that some number of inmates will find the length of their incarceration extended in violation of the Ex Post Facto Clause of the Constitution.

The Board also argues that we should follow the Fourth Circuit, which in the wake of *Morales* upheld against ex post facto challenges the retroactive application of both South Carolina's and Virginia's amended parole reconsideration statutes. *See Roller v. Gunn*, 107

F.3d 227 (4th Cir. 1997) (South Carolina); *Hill v. Jackson*, 64 F.3d 163, 169-70 (4th Cir. 1995) (Virginia). We do not find in these cases, however, any discussion or analysis of the absence in the statutes at issue of the procedural safeguards deemed essential in *Morales* to protect inmates against an increase in the "quantum of punishment" attached to their crimes. *See Roller*, 107 F.3d at 238-40 (dissent of Judge Hall). Moreover, the South Carolina statute as amended provides that affected inmates "only have [their] case[s] reviewed every two years after an initial negative parole determination rather than every year," *Roller*, 107 F.3d at 229 (citing S.C. CODE ANN. § 24-21-645 (Law. Co-op. 1997)), while the Virginia amendments authorize the extension of the period between parole reconsiderations from one year to three years. *Hill*, 64 F.3d at 166 (citing VA. CODE ANN. § 53.1-154 (Michie 1988)). The respective time-frames created for the subsequent parole reconsideration of inmates by the South Carolina and Virginia statutes are thus considerably shorter than the lengthy eight-year gap between parole reconsiderations authorized by the Georgia provision, thus creating less of a risk than the Georgia statute that "the measure of punishment" imposed on affected inmates will be "increased." *Morales*, 514 U.S. at 513.

Whether a particular provision violates the prohibition on ex post facto laws is a "matter of 'degree.'" *Morales*, 514 U.S. at 509 (quoting *Beazell*, 269 U.S. at 171). Given the length of time that the Georgia provision requires inmates to wait between parole consideration hearings and the absence of safeguards such as a "full hearing and review of all the relevant facts" and an obligation on the part of the Board to state particularized

facts relating to the inmate's likely future parole eligibility, we cannot conclude – as we must, to find no ex post facto violation – that the amended regulation "ha[s] neither the purpose nor the effect of increasing the quantum of punishment." *Lynce*, 117 S.Ct. at 897.

For the foregoing reasons, we conclude that *Akins* has not been overruled. Indeed, we find that the Supreme Court's reasoning in *Morales* and *Lynce* reaffirms the correctness of our holding in that case. Thus, pursuant to *Morales*, *Lynce*, and *Akins*, we REVERSE the district court's grant of the defendant's motion for summary judgment on the plaintiff's ex post facto claim, and REMAND the case to the district court for proceedings consistent herewith.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT L. JONES,	:	
Plaintiff,	:	
-v-	:	1:95-CV-3012-CAM
J. WAYNE GARNER, Chairman, Georgia State Board of Pardons and Paroles,	:	
Defendant.	:	

ORDER

(Filed Aug. 25, 1997)

Plaintiff Robert L. Jones, acting *pro se*, filed this case pursuant to 42 U.S.C. § 1983, alleging various violations of his constitutional rights. Following this Court's dismissal of the case as frivolous, Jones appealed. The United States Court of Appeals for the Eleventh Circuit affirmed dismissal as to Jones' due process, equal protection, and retaliation claims, but reversed as to his *ex post facto* claim, finding that the claim was "not necessarily frivolous" due to the holding in *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). The case was reopened, and all parties were served. The case is before the Court on Defendants' motion for summary judgment, Jones' motion for summary judgment, Defendants' motion to compel answers to mandatory interrogatories, and Jones' motions for production of documents and appointment of counsel. For the reasons stated herein,

Defendants' motion for summary judgment is granted, and all other motions are denied.

BACKGROUND

The facts in this case are not in dispute. In July 1974 Jones was sentenced to life in prison following conviction in the Superior Court of Fulton County on a murder charge. He escaped in November 1979. In August 1982, he was again sentenced to life in prison following conviction in the Superior Court of Fulton County on a second murder charge.

The rules and regulations which were in effect at the time of Jones' second offense required that he be initially considered for parole after seven years and that he be reconsidered every three years. Prior to the time he was initially considered for parole, the rules were amended to require reconsideration "at least every eight years."

Jones was initially considered for parole in 1989, seven years after his conviction. The Board of Pardons and Paroles (Board) denied parole because of Jones' multiple offenses, and he was scheduled for reconsideration in 1997 (eight years). Because of the intervening decision in *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991), Jones was actually reconsidered for parole in 1992 (three years). He was again denied parole, both because of his multiple offenses and because of the "circumstances and nature of the offense," and was scheduled for reconsideration in 1995. He was reconsidered in 1995 and, for a third time, denied parole, again because of his multiple offenses and because of the "circumstances and nature of the offense." Because of the

intervening decision in *Morales*, the amended regulation was applied, and Jones was scheduled for reconsideration in 2003 (eight years).

Jones contends that applying the amended regulation to him so that he will not be reconsidered for parole for eight years violates his rights under the *ex post facto* clause of the United States Constitution.

LEGAL STANDARDS AND ANALYSIS

Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The parties agree that there are no genuine issues of material fact, and both parties have moved for summary judgment. At issue is whether the Supreme Court decision in *Morales* overruled the decision of the Court of Appeals in *Akins*. Jones relies upon *Akins* in support of his position that reducing the frequency of his parole reconsideration hearings violates his rights under the *ex post facto* clause. Defendants rely upon *Morales* in support of their position that increasing the number of years permitted between parole reconsideration hearings for inmates serving life sentences does not violate the *ex post facto* clause. Although one panel of the Court of Appeals suggested that "[i]n light of *Morales*, the continuing validity of *Akins* is questionable," *Jones v. Georgia State Bd. of Pardons and Paroles*, 59 F.3d 1145, 1149 n. 8 (11th Cir. 1995), the Court of Appeals, in reversing this Court's dismissal of the case as frivolous, indicated that *Morales* does "not necessarily" overrule *Akins*.

In *Akins*, the Court of Appeals held that reducing the frequency of parole reconsideration hearings could "as a matter of law violate the *ex post facto* clause." *Akins*, 922 F.2d at 1565. The Court of Appeals further held that the actions of the Board in retroactively applying the changes and denying annual reconsideration hearings to the plaintiffs did violate their rights under the *ex post facto* clause. *Id.* Before reaching its decision, the Court of Appeals determined that: (1) the rules and regulations promulgated by the Board pursuant to authority delegated by the Georgia legislature "to enact rules and regulations concerning parole reconsideration" were "laws" within the meaning of the *ex post facto* clause, *id.* at 1561 (citing O.C.G.A. § 42-9-45 (1989)); (2) parole reconsideration hearings were a part of parole eligibility because "an inmate is effectively ineligible for parole between two parole reconsideration hearings," *id.* at 1562 (emphasis in original); and (3) the *ex post facto* clause's restrictions applied to a change in parole eligibility because parole eligibility is part of the sentence imposed as punishment for a crime, *id.* at 1563. The Court of Appeals then applied the two-prong analysis developed by the Supreme Court, *id.* (citing *Weaver v. Graham*, 450 U.S. 24 (1981)), determining (1) that the Board's actions were "retrospective" because "the Board effectively altered the consequences of [the plaintiffs'] crimes after they were completed," *id.* at 1563-64, and (2) that the amendments "disadvantage[d] the [plaintiffs]" because the change, by increasing the time between two reconsideration hearings, "increased the time an inmate must spend in prison before he can again become eligible for parole," *id.* at 1564. In *Morales*, the Supreme Court held that California did not violate

the *ex post facto* clause by applying an amendment which decreased the frequency of parole suitability hearings to prisoners who committed their crimes before the amendment was enacted. *Morales*, 514 U.S. 499, 501-02 (1995). The Court, however, specifically "express[ed] no view as to the constitutionality of any of a number of other statutes that might alter the timing of parole hearings under circumstances different from those present here." *Id.* at 509 n.5.

California changed its parole procedures from requiring annual parole reconsideration hearings to permitting the Board of Prison Terms to defer hearings for up to three years "if the prisoner has been convicted of 'more than one offense which involves the taking of a life' and if the Board 'finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.' " *Id.* at 503. As had the Eleventh Circuit in *Akins*, the Ninth Circuit held that reducing the frequency of reconsideration hearings violated the *ex post facto* clause because having parole hearings less often effectively increased the prisoner's sentence since the prisoner could not be paroled without first having a hearing. *Id.* at 504. The Supreme Court found that the amendment at issue did not change the prisoner's sentencing range, did not change "the substantive formula for securing any reductions to this sentencing range," and did not change "the standards for fixing a prisoner's initial date of eligibility for parole or for determining his suitability for parole and setting his release date." *Id.* at 507 (citations omitted). The amendment at issue made only one change: "It introduced the possibility that after the initial parole hearing, the Board

would not have to hold another hearing the very next year, or the year after that, if it found no reasonable probability that [the prisoner] would be deemed suitable for parole in the interim period." *Id.* The change merely relieved the Board of the necessity of holding parole hearings for prisoners who had no reasonable chance of being released. *Id.*

The Court emphasized that determining whether a change implicates the *ex post facto* clause is a matter of degree – "whether [the change] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 509. The Court found that the California amendment created "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment." *Id.* Although the Court declined to establish a formula for determining when a change implicates the *ex post facto* clause, it found the following factors significant in reaching the *Morales* decision: (1) "the amendment applie[d] only to a class of prisoners for whom the likelihood of release on parole [was] quite remote," *id.* at 510; (2) "[t]he amendment [had] no effect on the date of any prisoner's initial parole suitability hearing [as] it affect[ed] the timing only of *subsequent* hearings," *id.* at 511 (emphasis in original); (3) "the Board retain[ed] the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner," *id.*; (4) the possibility existed for an expedited hearing where a change in circumstances altered the prisoner's suitability for parole, *id.* at 512-13; and (5) "the practical effect of a hearing postponement [was] not significant"

since the actual release date was frequently several years after a finding of suitability for parole, *id.* at 513.

The *Morales* decision supports the preliminary holding in *Akins* that the rules and regulations concerning parole reconsideration are "laws" within the meaning of the *ex post facto* clause, that parole reconsideration hearings are a part of parole eligibility, and that the *ex post facto* clause's restrictions apply to a change in parole eligibility. As was the case in *Akins*, applying the amended regulation so that Jones will be reconsidered for parole only after eight years is a retrospective application. This Court must determine whether, in light of *Morales*, the amendments disadvantage Jones by increasing the time between hearings.

The Georgia Administrative Code currently requires that "inmates serving life sentences who have been denied parole" be given reconsideration hearings "at least every eight years." Ga. Comp. R. & Regs. 475-3-.05(2). The Board's policy statement specifies that

> all Life Sentence Cases denied parole may be set for reconsideration up to a maximum of eight years from the date of last denial when, in the Board's determination, it is not reasonable to expect that parole would be granted during the intervening years. Inmates set-off under this policy may receive expedited parole reviews in the event of a change in their circumstance or where the Board receives new information that would warrant a sooner review.

State Board of Pardons and Paroles Policy Statement No. 4.110.

Here, as in *Morales*, the amendment of which Jones complains changes only the timing between reconsideration hearings, relieving the Board of the necessity of holding parole hearings for prisoners who have no reasonable chance of being released. It does not change any prisoner's sentencing range, the substantive formula for evaluating a prisoner for release, or the standards for setting a prisoner's initial date of eligibility for parole. The change applies only to prisoners serving life sentences who have been denied parole at least once, "a class of prisoners for whom the likelihood of release on parole is quite remote," *Morales*, 514 U.S. at 510; it affects only the timing of reconsideration hearings; the Board retains the authority to set subsequent hearings at a time suitable to the "particular circumstances of the individual prisoner," *id.* at 511; the Board's policies specifically provide for an expedited reconsideration hearing if a prisoner's circumstances change or if the Board receives new information that might affect a prisoner's chance of parole.

The Court finds that, as in *Morales*, the change to which Jones objects creates "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment." *Id.* at 509. It does not disadvantage Jones and therefore does not violate his rights under the *ex post facto* clause.

CONCLUSION

The Court GRANTS Defendants' motion for summary judgment, DENIES Jones' motion for summary judgment, and DENIES all other outstanding motions as moot.

Clerk of Court is directed to enter judgment in favor of Defendants. This closes the case.

SO ORDERED, this 25 day of August, 1997.

/s/ Charles A. Moye, Jr.
UNITED STATES
DISTRICT JUDGE
CHARLES A. MOYE, JR.

CAM:J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT L. JONES,	.	CIVIL ACTION FILE
Plaintiff,	.	NO. 1:95-cv-3012-CAM
	.	
vs.	.	
J. WAYNE GARNER, et al.,	.	
	.	
Defendant.	.	

JUDGMENT

This action having come before the court, Honorable Charles A. Moye, Jr., United States District Judge, for consideration of defendants' motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is **dismissed**.

Dated at Atlanta, Georgia, this 25th day of August, 1997.

LUTHER D. THOMAS
CLERK OF COURT

By: /s/ Joyce White
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
August 26, 1997
Luther D. Thomas
Clerk of Court

By: /s/ Joyce White
Deputy Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-9009

ROBERT L. JONES,

Plaintiff-Appellant,

versus

J. WAYNE GARNER, Employed as Chairman, State Board of Pardons and Paroles, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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(Filed Apr. 19, 1999)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: BIRCH and BARKETT, Circuit Judges, and HANCOCK*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

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* Honorable James H. Hancock, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE
